**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 10, 2000**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-4076 & 99-10524
D. C. Docket No. 97-8151-CIV-HURLEY

MARVIN DAVIS,

Plaintiff-Appellant,

versus

FLORIDA POWER & LIGHT CO.,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

**(March 10, 2000)**

Before BLACK and HULL, Circuit Judges, and GOODWIN*, Senior Circuit Judge.

HULL, Circuit Judge:

Plaintiff Marvin Davis ("Davis") appeals the entry of judgment for Defendant Florida Power & Light Company

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* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

("FPL") on his employment discrimination claims under the Americans with Disabilities Act of 1990 ("ADA"). After review, we affirm the district court's determination that Davis failed to establish a prima facie case of disability discrimination for two reasons. First, FPL's mandatory overtime work was an essential function of Davis's job of reconnecting electrical power service for FPL's customers. Davis was not a qualified individual protected by the ADA because he could not work the overtime FPL required. Second, Davis's requested accommodations of no or selective overtime work contravened the seniority provisions of his union's collective bargaining agreement and were unreasonable accommodations as a matter of law.

## I. FACTUAL BACKGROUND

In 1985, Davis began work with FPL, a utility company providing electricity to businesses and residences throughout Florida. Overtime was required at FPL due to the nature of its electric utility business, including the need to maintain a steady flow of power, to remedy power outages, and to reconnect power quickly to its customers. In completing his job application, Davis indicated his agreement to work overtime as a condition of employment.[1]

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1. Specifically, Davis answered "yes" to this question: "FPL must provide 24-hour-a-day service to its customers. Therefore, many of our jobs require employees to sometimes work overtime. . . . Are you agreeable, as a condition of employment, to work whatever schedule is necessary to help us meet . . . our obligations to our customers?"

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A collective bargaining agreement with the International Brotherhood of Electrical Workers ("IBEW") governed FPL's relationship with many employees, including Davis. Because most FPL jobs required overtime, that agreement dictated how FPL assigned overtime work. The agreement provided that FPL must offer voluntary overtime on a most-senior to least-senior basis. If more overtime is needed, mandatory overtime must be imposed on the most junior employees first. The agreement also allowed FPL to require employees to work "holdover overtime," which was assigned to employees already on a job and irrespective of seniority.

In 1990, Davis sustained a back injury on the job while working as a lineman. Davis was placed on "light duty" and later diagnosed as having a herniated disc. After treatment, Davis returned to "full duty." When his lineman duties aggravated his back condition, Davis's doctor suggested that he transfer to a less strenuous position.

In 1991, Davis bid for and obtained a "Street Light Maintenance" position at FPL. After a short time in this position, Davis bid for and obtained another "lineman" position.[2] When that job again aggravated Davis's back condition, FPL placed Davis on "light duty." A disagreement arose between Davis and FPL leading to a suspension for a year.

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2. Davis made this bid due to what Davis alleges were intolerable working conditions. According to Davis, his various supervisors subjected him to constant harassment and intimidation because of his disability. Because Davis does not challenge the district court's finding that pre-March 1996 conduct was time-barred, we omit the facts surrounding those allegations.

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In late 1993, Davis returned to "light-duty" work and in early 1994 bid for a Connect and Disconnect ("C&D") position. The C&D position involves connecting and disconnecting electric service to FPL's customers by installing, removing, and reading electric meters. The C&D position carries out FPL's connect and reconnect policy, which requires that customer orders be processed and executed the same day or within twenty-four hours. Davis met the requirements listed on FPL's form entitled "Essential Job Functions — Connect & Disconnect Man."[3] The form and FPL's written job description for the C&D position do not address working hours or overtime work, but the collective bargaining agreement does. That agreement lists the work schedule of a C&D employee as "five (5) days of eight (8) consecutive hours per day," and expressly grants FPL "the right to require employees to work overtime." In 1996, the 84 C&D employees worked 18,175 hours of overtime, averaging 216 overtime hours each. C&D employees work the third highest average number of overtime hours of some forty different FPL jobs, although almost all jobs require some overtime. The relatively high C&D overtime figure was in part due to FPL's aggressive same-day connect and reconnect policy. The volume and time constraints of C&D work occasionally necessitated simultaneous overtime for all C&D employees.

In 1996, Davis's doctor suggested that he work no more than eight hours a day because of his back condition. Shortly

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3. The form listed nine different job requirements, including frequent walks on varied surfaces while wearing a 10-pound tool belt, performing duties in direct sunlight and after dark, and possessing sufficient stamina to work in inclement weather.

thereafter Davis was suspended. According to Davis, he was suspended because he could not work overtime. FPL contends that Davis was placed on worker's compensation leave because his medication caused drowsiness, interfering with his ability to drive his FPL truck, and because there were no "light-duty" positions available.

Over the next eight months a series of meetings, letters, and negotiations followed. Davis insisted that FPL accommodate his disability by guaranteeing him no overtime or allowing him to decide each day whether to work overtime depending on his personal assessment of his back condition at shift end. FPL refused this request, but offered Davis two options. First, Davis could return to work in a full-duty C&D position with a guarantee of no overtime for sixty days. The IBEW agreed to this sixty-day concession. Second, FPL offered to allow Davis to transfer to another IBEW position or transfer to a non-IBEW position. Pursuant to the collective bargaining agreement, FPL provided Davis with a list of jobs and a seniority roster for him to determine what jobs were open to someone with his seniority. After Davis's contractual right to transfer expired, FPL extended the time period for Davis to request a transfer and provided him with information regarding average amounts of overtime per position.

Davis rejected FPL's offers, and FPL refused Davis's requested accommodations. Davis refused to return to C&D work without one of his accommodations and was terminated in March 1997.

*Appendix A*

## II. PROCEDURAL HISTORY

Davis then filed this lawsuit alleging (a) disability discrimination, in violation of the ADA and the Florida Civil Rights Act of 1992, and (b) discriminatory retaliation, in violation of the ADA, Florida's Workers Compensation Law, and Florida's Whistle Blower Act. In an order dated January 7, 1999, the district court granted summary judgment to FPL on all federal and state claims. Davis subsequently filed a motion for relief from judgment under Rule 60(b), addressing only his requested accommodations under the ADA. Fed. R. Civ. P. 60(b). In an order dated March 24, 1999, the district court denied this motion. Davis timely appealed both orders.[4] On appeal, however, Davis addresses only his ADA claims and not his state law claims. Furthermore, the issues Davis raises on appeal about his retaliation claims under the ADA lack merit.[5] Thus, we address only Davis's disability discrimination claims under the ADA.

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4. Davis's appeal of the denial of his Rule 60(b) Motion in Appeal No. 99-10524 was consolidated with Davis's appeal from the grant of summary judgment in Appeal No. 99-4076. We review the district court's grant of summary judgment *de novo*, applying the same legal standards as the district court. *See Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999). Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). We review the denial of Davis's Rule 60(b) Motion for abuse of discretion. *See Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993).

5. Davis primarily alleges that the district court erred in finding that Davis failed to establish a prima facie case of retaliation under the ADA. Because we find no merit to this contention, we affirm without further discussion. *See* 11th Cir. R. 36-1.

## III. DISCUSSION

The ADA provides that no covered employer shall discriminate against "a qualified individual with a disability because of the disability of such individual" in any of the "terms, conditions, [or] privileges of employment." 42 U.S.C. § 12112(a) (1994). "Indeed, the ADA imposes upon employers the duty to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship to the employer." *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996) (citing 42 U.S.C. 12112(b)(5)(A)). The ADA places the burden on the employee to establish a prima facie case of disability discrimination. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1526 (11th Cir. 1997). To establish a prima facie case of disability discrimination, Davis must prove that (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *See Morisky*, 80 F.3d at 447. As outlined below, we find that the district court correctly held that Davis failed to show that he was a qualified individual with a disability.[6]

### A. Qualified Individual

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the

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6. FPL argues that Davis fails to establish a "disability" because his back condition does not substantially limit his major life activities. Since we find that Davis is not a qualified individual, we do not reach whether Davis has a disability within the meaning of the ADA.

employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Davis must show either that he can perform the essential functions of his job without accommodation, or, failing that, show that he can perform the essential functions of his job with a reasonable accommodation. *See Holbrook*, 112 F.3d at 1526. Thus, if Davis is unable to perform an essential function of his C&D job, even with an accommodation, he is, by definition, not a "qualified individual" and, therefore, not covered under the ADA. *See Cramer v. Florida*, 117 F.3d 1258, 1264 (11th Cir. 1997). In other words, the ADA does not require FPL to eliminate an essential function of Davis's job. Therefore, the first issue is whether mandatory overtime work is an essential function of the C&D position.

Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that consideration shall be given to the employer's judgment as to what functions of a job are essential and the employer's written description for that job. *See* 42 U.S.C. § 12111(8). The ADA regulations provide that other factors to consider are: (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of the collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs. *See* 29 C.F.R. § 1630.2(n)(3) (1999).

After considering these factors, the district court correctly held that mandatory overtime work is an essential function of Davis's C&D position. First, FPL deems

mandatory overtime to be an essential function of that position due to the unique nature of the electric industry and FPL's same-day reconnect policy. Second, FPL's application indicated that working overtime was "a condition of employment." Davis also admitted that overtime was represented to him as a condition of employment. Third, FPL's aggressive connect and reconnect policy creates fluctuating production requirements and heightens FPL's reliance on its ability to require overtime from C&D employees. Fourth, FPL's evidence demonstrated that each C&D position undisputedly required a substantial amount of overtime work. For example, each C&D employee worked an average of 216 overtime hours in 1996. Fifth and significantly, FPL's bargained-for-agreement with the IBEW grants FPL the right to require involuntary overtime and outlines the specific methods by which it may do so. All of these factors demonstrate that mandatory overtime is an essential function of the C&D position.

We recognize that FPL's job description and form for the C&D position do not address working hours or overtime. But we disagree with Davis's argument that this means that his working hours and overtime cannot be deemed essential functions as a matter of law. Davis's argument ignores the undisputed facts that the collective bargaining agreement expressly sets forth both the working hours and the overtime requirement and that nothing in FPL's job description and form addresses those matters, much less contradicts the collective bargaining agreement. Moreover, the job application also makes clear that overtime is a condition of employment in a C&D position.

We also reject the EEOC's argument that "working overtime" can never be an "essential function" of a job.[7] The EEOC narrowly equates "function" with task and argues that overtime is not a task to be performed. However, in FPL's electric utility business, mandatory overtime work is the means by which FPL implements its same-day connect and reconnect policy. FPL's connect and reconnect policy generates for a C&D employee certain meters that must be installed or reconnected that day. While certain equipment may be used to install and reconnect the electric service, overtime is the tool that gets that work done the same day and is thus an integral part of the C&D position. In effect, overtime work in a C&D position at this electric utility company is akin to job presence, which has been held to be an essential function of a job. *See Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 900 (7th Cir. 2000) ("[O]ur review of the entire record in this case supports the district court's finding that regular attendance is an essential function of the tool and die maker position . . . ."); *Tyndall v. National Educ. Ctrs. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) ("An employee who cannot meet the attendance requirements of [a university teacher] cannot be considered a 'qualified' individual protected by the ADA."); *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir.) (holding under Rehabilitation Act that a housekeeping aid had failed to prove that he was "an otherwise qualified individual because he ha[d] failed to satisfy the presence requirement of his job"), *cert. dismissed* 513 U.S. 1052 (1994); *see also Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1231 (11th Cir. 1999)

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7. The Equal Employment Opportunity Commission ("EEOC") filed an amicus brief on Davis's behalf.

(citing with approval *Tyndall*'s discussion of job presence as an essential function under the ADA and concluding plaintiff could not prove associational discrimination because she was not a qualified individual).[8]

For all of these reasons, we conclude that the district court correctly held that mandatory overtime was an essential function of Davis's C&D position.

**B. Unreasonable Accommodation**

We also conclude that the district court correctly found that Davis's requested accommodations were unreasonable as a matter of law. The ADA does not require accommodations, such as those Davis requested, that contravene the seniority rights of other employees under a collective bargaining agreement. In so concluding, we join eight other circuits which have held that an accommodation

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8. In an analogous situation, the First Circuit dismissed the plaintiff's ADA claim on other grounds, but nonetheless addressed the "essential function" notion within the context of the plaintiff's claim under the Family Medical Leave Act. *See Tardie v. Rehabilitation Hosp.*, 168 F.3d 538 (1st Cir. 1999). The First Circuit wrote that "[a]t bottom, [plaintiff] offers no evidence that she or anyone else could perform the job in only forty hours per week," and thus "the district court did not err in finding that working more than 40 hours per week was an essential function of the position." *Id.* at 544. The court also noted: "At oral argument, [plaintiff's] counsel argued that the time spent at a job is not a 'function' of the job; it is a capability. [Plaintiff] claims that only specific duties can be 'functions' of a position. . . . [Plaintiff] cites no authority for this distinction, and we believe it to be mere semantics." *Id.* at 543-44.

that contravenes the seniority rights of other employees under a collective bargaining agreement is unreasonable as a matter of law. *See Willis v. Pacific Maritime Ass'n*, 162 F.3d 561, 566-68 (9th Cir. 1998); *Feliciano v. Rhode Island*, 160 F.3d 780, 786-87 (1st Cir. 1998); *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1271 n.5 (10th Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995).[9] As the Seventh Circuit held in *Eckles*, "the ADA does not require disabled

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9. For example, in *Willis v. Pacific Maritime Ass'n*, the Ninth Circuit held that "an employee's proposed accommodation under the ADA is unreasonable if it conflicts with a bona fide seniority system established under a [collective bargaining agreement]." *Willis*, 162 F.3d at 566; *see also Feliciano*, 160 F.3d at 787 ("[T]he failure to automatically reassign [the employee] to that position — in violation of the rights of the person who received the position under the selection process outlined in the collective bargaining agreement and departmental policies does not violate the ADA."); *Foreman*, 117 F.3d at 810 ("[T]he ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); *Benson*, 62 F.3d at 1114 ("The ADA does not require that [the employer] take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."). A panel of the D.C. Circuit reached a contrary holding in *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir. 1997), but that opinion was vacated when the case was taken en banc. The en banc court's opinion did not reach a holding on this issue, but its analysis is consistent with the rule that we adopt in this case. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1301-03 & n.25 (D.C. Cir. 1998) (en banc).

individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees." *Eckles*, 94 F.3d at 1051. We agree with the Seventh Circuit that "collectively bargained seniority rights have a pre-existing special status in the law and that Congress to date has shown no intent to alter this status by the duties created under the ADA." *Id.* at 1052.[10]

Accordingly, FPL is not required to grant either of Davis's requested accommodations because they conflict with the seniority rights of other C&D employees under their union's collective bargaining agreement. That agreement expressly distributes mandatory overtime by seniority, so that those with the least seniority are compelled to work overtime first. If Davis were given the accommodation of no overtime or selective overtime depending on Davis's personal assessment of his back condition at the end of each shift, then more senior employees, who otherwise would not have to work overtime, would be required to do so, and that is not required by the ADA. *See Kralik*, 130 F.3d at 80-83

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10. In his Rule 60(b) Motion, Davis emphasized the EEOC's "Policy Guidance on Reasonable Accommodation Under the ADA" ("Policy Guidance"), which was issued after the district court granted summary judgment. That Policy Guidance poses this question: "Can an employer claim that a reasonable accommodation imposes an undue hardship simply because it violates a Collective Bargaining Agreement (CBA)?" 12 Empl. Discrim. Rep. (BNA) 317 (Mar. 3, 1999). The Policy Guidance answers the question "no" and recommends analysis on a case-by-case basis, but notes that circuit courts have rejected this interpretation of the ADA. Joining these circuits, we find that this Policy Guidance is inconsistent with the ADA statute as construed by the courts before the EEOC issued its Policy Guidance.

(finding accommodation of no forced overtime violates collective bargaining agreement and therefore is not required by the ADA); *Eckles*, 94 F.3d at 1045, 1051-52 (holding accommodation of being protected from being "bumped" from position conflicts with the collectively bargained rights of others who otherwise would have seniority to bump employee, so that accommodation is not required by the ADA). Therefore, the district court properly held that Davis's requested overtime accommodations were unreasonable as a matter of law because each conflicted with the applicable collective bargaining agreement.

## IV. CONCLUSION

In conclusion, we affirm the district court's grant of summary judgment in favor of FPL on all of Davis's claims and affirm the district court's denial of Davis's Rule 60(b) motion for relief from that judgment.

**AFFIRMED.**

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED JANUARY 7, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-8151-CIV-HURLEY

MARVIN DAVIS,

Plaintiff,

v.

FLORIDA POWER & LIGHT,
a Florida Corporation,

Defendant.

### ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the court on defendant's motion for summary judgment.

Marvin Davis ("plaintiff" or "Davis"), formerly employed as a lineman for Florida Power & Light ("FP&L" or "defendant"), is suing FP&L for allegedly discriminating against him by harassing him, refusing to accommodate his inability to work overtime and ultimately firing him, all based upon a disability arising from a back injury. Plaintiff has

asserted numerous claims pursuant to state and federal law, chiefly the Americans with Disabilities Act of 1990 ("ADA" or "the Act"). Defendant has moved for summary judgment as to all counts. For reasons set forth herein, the court will grant that motion.

## I. *Summary Judgment Standard*

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 698 (11th Cir. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S 317, 323, 106 S. Ct. 2548, 2553 (1986) (quoting Fed.R. Civ.P. 56(e))). The non-moving party must then go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. Issues of fact are "genuine only if a reasonable jury considering the evidence presented could find for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505 (1986). In making its determination, the court must view all of the evidence in the light most favorable to the nonmoving party, *Sweat v. Miller Brewing Co.* 708 F.2d 655, 656 (11th Cir. 1983) (quotation omitted), and all doubts must be resolved in favor of the non-moving party, *Hayden v. First Nat. Bank of Mt. Pleasant*, 595 F.2d 994, 996-7 (5th Cir. 1979).

*Appendix B*

## II. *Facts*

Before setting forth the facts of this case as alleged by plaintiff, the court notes that FP&L is a unionized workplace. This is significant because an important legal issue in this case involves the conflict between the protections offered by the ADA and the rights of one's coworkers under a collectively bargained seniority scheme. Plaintiff is part of the International Brotherhood of Electrical Workers ("IBEW"). The IBEW negotiated a collective bargaining agreement, in the form of a Memorandum of Agreement ("MOA") that governs FP&L's relationship with its electrical workers. Plaintiff acknowledges that the MOA gives FP&L the right to *require* employees to work overtime and that distribution of overtime is governed by a seniority scheme set out in the MOA. Overtime is required for most all FP&L positions due to the nature of the electric utility industry, i.e., the need to maintain a steady flow of power to customers and the need to deal with unforeseeable interruptions of such power supply.

### a. Plaintiff's Injury

Plaintiff began working for FP&L in 1985. In September of 1990, plaintiff sustained a back injury related to a "misaligned bucket." Plaintiff filled out an accident form shortly thereafter and initiated the process for making a workers' compensation claim. Plaintiff was placed on "light-duty." He was diagnosed as having a herniated disc, received treatment for the injury and returned to work in a "full-duty" capacity. Subsequently, the duties of plaintiff's lineman position began to aggravate his back and an orthopedic surgeon recommended that he not engage in such duties.

**b. Employment Under Supervisor Lee Davis**

Under the MOA, plaintiff was entitled to "bid" for another position. On January 25, 1992, plaintiff bid for and was assigned the position of "crew leader" at a different FP&L plant, where Ms. Lee Davis was his supervisor. During his short stint in this position, plaintiff claims that Ms. Davis subjected him to constant screaming, threats that he would be fired and admonitions that he was "not allowed to complain about [his] back." Plaintiff also alleges that Ms. Davis forced him to perform in a lineman capacity although his injury prevented him from performing various duties associated with that position.

**c. Employment Under Supervisor Larry Wesley**

In an effort to get away from Ms. Davis, plaintiff bid for and was assigned a temporary lineman position at the Gulfstream FP&L plant, where Larry Wesley was his supervisor. Plaintiff alleges that Mr. Wesley likewise subjected him to constant screaming, threats that he would be fired and accusations that "the doctors" had said there was nothing wrong with him. However, plaintiff acknowledges that when he complained that his duties were aggravating his back, he again was placed on light duty.

**d. 1992 Complaint to Human Resources and Suspension**

On December 1, 1992, plaintiff complained to FP&L's human resources center about the allegedly discriminatory and retaliatory treatment. Shortly thereafter he was

suspended; plaintiff claims the suspension was without cause. FP&L asserts that plaintiff was suspended because, although a workers' compensation doctor reported that his condition was normal and he was capable of full-time work, plaintiff maintained that he could not assume full duty work. (The reason listed on the paperwork for the suspension was changed one year after the fact from "disciplinary" to "other.")

Plaintiff asserts that while he was suspended, an FP&L manager told him that he was being targeted because of his injury and that "it was wrong."

Plaintiff returned to "light duty work" in December 1993 and alleges no problems with his then-supervisors.

**e. The "C&D" Position**

In January 1994, plaintiff exercised his right to bid for a transfer, and was assigned to a Connect and Disconnect ("C&D") position at the FP&L's West Palm Beach Service Center. The C&D position involves connecting and disconnecting electric service to residential/commercial customers by installing or removing electric meters. The union's MOA states that the work schedule for a C&D worker is "five (5) days of eight (8) consecutive hours per day." Plaintiff acknowledges, however, that the same MOA gives FP&L "the *right to require employees to work overtime.*" Pl.'s Mem. in Opp. at 17.

According to documents submitted by FP&L, C&D workers average the third highest number of overtime hours

of some forty different job titles reviewed. Govekar Aff. at Ex. D. The high number of overtime hours required of C&D workers is due, in part, to a "Reconnect Policy" requiring that customer orders be processed within a set period of time. Pursuant to the MOA, overtime is *offered* on a most senior to least senior basis and if there are no takers, involuntary overtime is *assigned* on a least senior to most senior basis. According to FP&L, plaintiff was, at all relevant times, on the low end of the seniority scale for C&D workers.

While plaintiff was working in the C&D position, Mr. Manuel Bueno was his supervisor. Although making general assertions that Mr. Bueno screamed at plaintiff, threatened to fire him and attempted to "make his work conditions so unbearable that [plaintiff] would be forced to quit," Pl.'s Facts, ¶ 30, plaintiff alleges no specific incident of harassment by Bueno until July 1996.

**f. Request for Accommodation of No Overtime**

In July 1996, plaintiff's physician instructed that he should not work more than eight hours per day. Shortly thereafter, plaintiff was "sent home" for reasons that are disputed by the parties. Plaintiff asserts that he was suspended because FP&L was unwilling to accommodate his inability to work more than eight hours per day. FP&L contends that plaintiff was sent home on workers' compensation leave because (1) the medication he was taking rendered him unable to drive a vehicle, as he was required to; and (2) there were no "light duty" positions available at the time.

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During the months that followed, FP&L made two offers to plaintiff: (1) he could maintain his position, work no overtime for sixty (60) days and then reassess the situation; or (2) exercise his rights pursuant to the MOA to find another job from a list of available positions with FP&L. Plaintiff declined both of these options and continued to insist that FP&L allow him to return to the C&D position with the accommodation of "no overtime" or "overtime on a case-to-case basis, depending on how [plaintiff's] back felt." In January 1997, when plaintiff refused to return to work without the requested accommodation, he was fired.

## III. *Analysis*

### a. The ADA Claims: Disparate Treatment and Failure to Provide Reasonable Accommodation in Violation of the ADA

In counts I and II, plaintiff asserts that FP&L violated the ADA in two ways. First, from the time of his injury in 1990, through the filing of his complaint, FP&L discriminated against plaintiff by treating him differently than similarly situated non-disabled employees.

Next plaintiff claims that he is able to perform the essential functions of the C&D position with a "reasonable accommodation of no overtime and no harassment," and that FP&L's failure to so accommodate him violates the ADA.

Despite the fact that plaintiff incorporates the identical factual allegations — virtually all of them — in support of *both* the disparate treatment claim and the failure to

accommodate claim, the factual underpinnings of the two counts can and must be separated. First, plaintiff's failure to accommodate claim arose in 1996, when his doctor first restricted him from working overtime and he requested that this restriction be accommodated. Any "disparate treatment" plaintiff may have experienced after that time is inextricably bound up with FP&L's alleged failure to accommodate his request for exemption from overtime work. Second, FP&L correctly argues that all of the other conduct alleged by plaintiff, which might otherwise support a disparate treatment claim, falls outside of the limitations period set by the Act and, as such, any claim based upon such conduct is time-barred. The merits of plaintiff's claims in counts I and II are discussed in part III.a.1 and the limitations issues, in part III.a.2.

### 1. Plaintiff Fails to Establish a Prima Facie Case of Discrimination Under the Act

The Americans with Disabilities Act of 1990, as amended in the Civil Rights Amendments Act of 1991, 42 U.S.C. § 12101 et seq., prohibits covered employers from discriminating based upon the known physical or mental impairments of a qualified individual with a disability. 42 U.S.C. § 12112. "Indeed the ADA imposes upon employers the duty to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship upon the employer." *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996) (citation omitted). In order to establish a prima facie case of discrimination in violation of the ADA, the plaintiff must prove that (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to

unlawful discrimination because of his disability. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1525 (11th Cir. 1997).

Plaintiff cannot make out a prima facie case under the Act for two reasons: (1) he is not a "qualified individual" within the meaning of the Act; and (2) the accommodation he requested is unreasonable as a matter of law.[1]

**A. Qualified Individual**

A "qualified individual" is one who "with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Where a plaintiff can only perform the essential functions of a position *with* accommodation, plaintiff bears the burden of establishing that reasonable accommodations are available and defendant, in turn, has the burden of persuasion that such accommodations would impose an undue hardship.

The employment position at issue here is the C&D position and Plaintiff states in his Complaint that at all material times, he was "ready, willing and able to return to work" in that capacity "with the reasonable accommodation of no overtime and no harassment." FP&L claims that working overtime is "an essential job function of the C&D position," and that plaintiff's claim that he was unable to

1. Defendant has also argued that plaintiff's prima facie case fails because he is not disabled within the meaning of the ADA. Because the court finds that plaintiff's prima facie case is fatally deficient in at least two other regards, the court need not address the disability issue.

work overtime means that he was not a "qualified individual" under the Act. FP&L further explains that even if overtime is not deemed an essential function of the C&D position, FP&L was not required to grant plaintiff's request for accommodation because, as a matter of law, it was not reasonable.

### i. Essential Function

As FP&L demonstrates, the initial job application filled out by plaintiff explains that "many [FP&L] jobs require employees to sometimes work overtime . . . ." Plaintiff checked "yes" in response to the question, "[a]re you agreeable, as *a condition of employment*, to work whatever schedule is necessary . . . ." Def.'s Ex. B (emphasis added). The affidavit of Pamela Govekar, a human resources consultant for FP&L, explains:

> Overtime is a requirement of nearly every FP&L employee because of the nature of the utility business. . . . Overtime is an essential function of the C&D position in particular due to FP&L's reconnect policy.

Def.'s Ex. 5, ¶ 5. FP&L has filed with its motion a chart breaking down by job classification the average number of overtime hours worked for over forty different FP&L positions. The chart shows that a C&D worker logged an average of 216 hours of overtime for 1996, distinguishing it as the position with the third highest rate of overtime hours out of all of the other positions listed. Govekar Aff. at Ex. D. Finally, plaintiff admits in his deposition that overtime

was represented to him "as a condition of employment" for the C&D position. Def.'s Ex. 1, at 165.

In opposition to this evidence, plaintiff asserts that overtime is not an essential function of the C&D position because (1) it is not listed on the "Essential Job Function" form for that position; (2) the written job description for the position does not mention overtime; and (3) although the MOA between FP&L and the IBEW contains a provision which gives FP&L the right to require employees to work overtime, the MOA states that the work schedule for the C&D position is "five (5) days of eight consecutive hours per day."

As the Eleventh Circuit has recognized, the ADA provides guidance in determining what functions of a given position may be considered "essential:"

> [C]onsideration shall be given to the employer's judgment . . . and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

*Holbrook*, 112 F.3d at 1526 (quoting 42 U.S.C. § 12111(8)). Regulations promulgated pursuant to the ADA further identify factors that can be considered in deciding whether a particular task is an "essential" part of a job:

> Evidence of whether a function is essential includes, but is not limited to:

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(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of the collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. §1630.2(n). *See also Holbrook*, 112 F.3d at 1526.

An application of these factors to the facts here at issue establishes that plaintiff fails to raise a genuine issue as to whether overtime was an essential function of the C&D position. First, FP&L deems overtime to be an essential function of the position, and the regulations direct the court to consider this judgment. *See Holbrook*, 112 F.3d at 1526. As to written job descriptions prepared before interviewing

applicants, plaintiff's job application states, and he accepts, that overtime is "a condition of employment." As to the amount of time spent on the job performing the function and the work experience of incumbents in the job, FP&L's chart reveals that the C&D position requires a significant commitment of overtime work. As to the consequences of not requiring the incumbent to perform the function, FP&L has explained that accommodation of plaintiff's request would be inconsistent with the MOA's seniority scheme.

Because overtime *is* an essential function of the C&D position, plaintiff is not a "qualified individual" within the meaning of the Act.

### B. Reasonableness of Requested Accommodation

The court concludes that there is a second and independent basis for holding that plaintiff fails to make a prima facie case under the ADA. If the accommodation requested by a disabled qualifying individual is not "reasonable," then the employer is under no legal obligation to grant such accommodation. Although reasonableness is often a jury question, a court can determine reasonableness as a matter of law in certain cases. *See Terrell v. USAir*, 132 F.3d 621 (11th Cir. 1998) (employer's refusal to create part-time airline reservations agent position to accommodate plaintiff's carpal tunnel syndrome was reasonable as a matter of law); *Taylor v. Food World, Inc.*, 133 F.3d 1419 (11th Cir. 1998) (as a matter of law, proposed accommodation of reassignment was not reasonable). For instance, other circuits have held that requested accommodations that are

inconsistent with the rights of other workers under a collectively bargained agreement are unreasonable as a matter of law. In the instant case, plaintiff's requested accommodation was, at a minimum, inconsistent with the rights of his coworkers under the terms of the MOA. As such, it was unreasonable as a matter of law and FP&L was not required to oblige it.

The leading case on the issue of employee rights under the ADA versus rights of other employees under a collective bargaining agreement is *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997). In *Eckles*, the court held that the request of an epileptic railyard master for special job placement and protection from "bumping," in violation of a collectively bargained seniority system, was unreasonable under the ADA as a matter of law. The rationale for this holding is that collectively bargained seniority systems had a "special status in the law" that pre-existed the passage of the ADA. *See e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (employee sought relief from Saturday work duties for religious reasons and court held that without a clear and express indication from Congress, an agreed-upon seniority system need not give way to accommodate religious observances). After examining the text of the ADA and the legislative history thereto, the Seventh Circuit determined that "Congress to date [had] shown no intent to alter this status by the duties created under the ADA." *Eckles*, 94 F.3d at 1051.

Although the *Eckles* decision has been criticized by some scholars and some lower courts have declined to follow it,

*see Willis v. Pacific Maritime Ass'n*, __ F.3d __, 1998 WL 852973 (9th Cir. Dec. 11, 1998) (discussing and rejecting "balancing approach" adopted by one district court and advocated by some scholars), the circuit courts that have addressed the issue have followed *Eckles* in holding that the ADA does not require an employer to take actions inconsistent with the contractual rights of other workers under a collective bargaining agreement. *See id.* at *4-5.[2]

Plaintiff's opposing argument is straightforward, but unavailing: *Eckles* was "wrongly decided." In support of this position, plaintiff draws a distinction between, on the one hand, the ADA — which does not "decisively answer" the question of conflicts between the ADA and collectively

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2. *See Kralik v. Durbin*, 130 F.3d 76, 83 (3rd Cir. 1997) (employee's request to be relieved of forced overtime was not reasonable accommodation); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997) ("Following the other circuits which have considered this issue, we hold that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) (holding as unreasonable a request for transfer to another job where transfer would violate seniority rights under collective bargaining agreement); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995) ("The ADA does not require that [the employer] take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."). *See also Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (under provisions of the Rehabilitation Act, substantially similar to ADA, employer not required to take action that would contravene seniority rights of other employees under CBA); *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) (same).

bargained seniority systems — and, on the other hand, earlier anti-discrimination statutes which contain *express* exemptions for seniority systems. Although plaintiff cites language from the legislative history of the Act that appears to support the argument that Congress did not intend for seniority systems automatically to trump reasonable accommodation claims under the ADA,[3] the fact remains that at least six circuits have considered this issue and deferred to seniority rights over accommodation claims.[4] Indeed the only circuit court decision to hold that the terms of a collective bargaining agreement are a factor in determining reasonableness, but not dispositive, was vacated after a reheating en banc. *See Aka v. Washington Hosp. Cntr.*, 116 F.3d 876, 894-97 (D.C. Cir. 1997), *vacated*, 124 F.3d 1302 (D.C. Cir. 1997).

Although the Eleventh Circuit has yet to address the issue, the court is persuaded by the well-reasoned conclusions of the other circuits. Thus, the court holds, as a matter of law, that the accommodation requested by plaintiff was not reasonable.

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3. "If a collective bargaining agreement reserves certain jobs for employees with [seniority], it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job. However, *the agreement would not be determinative on this issue*." H.R. Rep. No. 101-485, 101st Cong., 2d Sess. 63 (1990) (emphasis added).

4. *See supra* note 6.

**2. ADA Claims Arising Prior to March 1996 are Time-Barred**

Plaintiff filed this claim on January 9, 1997, alleging discriminatory conduct dating back to 1990. FP&L asserts that because claims arising more than three hundred (300) days prior to the filing of a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") are time-barred, 42 U.S.C. § 2000e-5(e)(1), plaintiff cannot rely in his discrimination claim on conduct occurring prior to March 15, 1996.[5] Plaintiff counters that his entire complaint is based on a "continuing violation," exempting him from the limitations period.

The Eleventh Circuit has recognized that the continuing violation exception must be strictly construed. Discussing the exception in the context of a Title VII case, the court explained: a "liberal application of the doctrine would provide an end-run around the policy underlying [the statute's] . . . . filing requirement." *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 799 (11th Cir. 1988).

The Supreme Court discussed the "continuing violation" theory in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977), stressing that in order to show a "continuing violation," plaintiff must establish a present violation — one falling within the statutory limitations period. As discussed in the previous section, plaintiff cannot make a prima facie

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5. The alleged harassment prior to March 1996 includes the treatment of plaintiff by Lee Davis between May 1991 and January 1992 and by Larry Wesley between December 1992 and January 1994.

case of discrimination. Without such a "present violation," the court cannot entertain plaintiff's allegations of discriminatory conduct occurring beyond the limitations period.

Furthermore, even if the court were to conclude that plaintiff had established a present violation, he would still have to establish that the alleged acts were closely related enough to constitute a continuing violation rather than merely being "discrete, isolated and completed acts which must be regarded as individual violations." *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 800 (11th Cir. 1988). On the facts of this case, plaintiff would not be able to establish this.

**b. Retaliation in Violation of the ADA, Florida's Whistle Blowers Act and Florida Statute 440.205[6]**

Counts III (ADA), IV (Florida Whistle Blower's Act, Florida Statutes §§ 448.101 et seq.) and V (Florida Statute 440.205), each alleging that FP&L engaged in illegal retaliation, share a common factual predicate: plaintiff lodged "complaints" against FP&L and FP&L illegally retaliated against him for such complaints when supervisors screamed at him, threatened to fire him, told him that he was not allowed to complain about his bad back, forced him to perform work he could not perform because of his back,

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6. Like the ADA, the Florida Whistle Blowers Act and Fla. Statute 440.103 both contain limitations provisions that preclude a plaintiff from asserting stale claims. Without engaging in a separate analysis for each of these statutes — the limitations periods vary — the court notes that much of the complained-of conduct falls outside of the controlling limitations periods.

suspended him for unexplained "disciplinary reasons," called him at home and told him to return to work in a capacity he was not able to, suspended him a second time, and, finally, terminated his employment.

### 1. Retaliation Claims Under NDA and Whistle Blower Statute

The Eleventh Circuit has recognized that the ADA embodies "a prohibition on retaliation . . . that is similar to Title VII's prohibition on retaliation." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). Accordingly, a court should assess an ADA retaliation claim under the same framework employed for retaliation claims arising under Title VII. *Id.* (citing *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1075-77 (11th Cir. 1996) (relying on Title VII jurisprudence to interpret meaning of ADA provisions in a retaliation case)).

To establish a prima facie case of retaliation pursuant to Title VII, a plaintiff must show: (1) statutorily protected expression; (2) adverse employment action; and (3) a causal link between the protected expression and the adverse action. *See Meeks v. Computer Assocs. Intern.*, 15 F.3d 1013, 1021 (11th Cir. 1994). Once a prima facie case is established, the burden then shifts to the defendant employer to come forward with legitimate non-discriminatory reasons for its actions that negate the inference of retaliation. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). The plaintiff must then demonstrate that it will be able to establish at trial that the employer's proffered non-discriminatory reasons are a pretextual ruse designed to mask retaliation.

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*Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 440 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997).

FP&L's asserts that the only arguably actionable "adverse employment action," discharge, has no causal connection to plaintiff's alleged protected activities. FP&L is correct on this point: plaintiff has failed to make out a prima facie case of discrimination and, as such, FP&L's firing of plaintiff, based upon his refusal to accept the basic terms of his employment and return to work, or to take advantage of his right to bid for another position, cannot be the basis for a claim of retaliation.

Plaintiff argues that his 1996 suspension was also retaliatory and that the reason for the suspension is a disputed factual issue. Nevertheless, even accepting plaintiff's assertion that he was suspended because FP&L would not accommodate his request to be exempt from overtime, plaintiff still fails to meet his burden here because it was not illegal for FP&L to refuse to make such an accommodation.

Because Florida's Whistleblower statute likewise focuses on an "adverse employment action" taken by an employer against an employee because of an employee's objection to, or refusal to participate in, some illegal practice of the employer, *see* Fla. Stat. 448.101(5), the same rationale just discussed likewise supports dismissal of this claim.

**2. Violation of Florida Statute 440.205**

Plaintiff claims that FP&L violated Florida Statute 440.205, which prohibits retaliation against an employee for

filing a workers' compensation claim. The statute of limitations under this statute is four years. Plaintiff filed a workers' compensation claim in 1990 and complains now that he was retaliated against for doing so. This claim is not timely.

**3. Violation of the Florida Civil Rights Act of 1992**

Finally, plaintiff has also asserted a state law claim of discrimination in violation of Florida's Civil Rights Act of 1992. For all of the reasons discussed, *supra*, this claim likewise fails. *See Greene v. Seminole Elec. Co-op., Inc.*, 701 So.2d 646 (Fla. 5th DCA 1997) (Florida Civil Rights Act should be construed in conformity with the American with Disabilities Act (ADA), and its predecessor the Rehabilitation Act); *Brand v. Florida Power Corp.*, 633 So.2d 504, 509 (Fla. 1st DCA 1994) (if Florida statute is modeled after federal law on same subject, Florida statute will take on same construction as is placed on its federal prototype, insofar as such interpretation is harmonious with spirit and policy of Florida legislation).

**IV. *Conclusion***

For all of the above-discussed reasons, it is hereby **ORDERED and ADJUDGED** that defendant's Motion for Summary Judgment [DE #37] is **GRANTED**.

**DONE** and **SIGNED** in Chambers at West Palm Beach, Florida this 7th day of January, 1999.

s/ Daniel T.K. Hurley
Daniel T. K. Hurley
United States District Judge

**APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 4, 2000**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 99-4076-GG & 99-10524-GG

MARVIN DAVIS,

Plaintiff-Appellant,

versus

FLORIDA POWER & LIGHT COMPANY,
a Florida Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BLACK and HULL, Circuit Judges, and GOODWIN*, Senior Circuit Judge.

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* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

*Appendix C*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

## APPENDIX D — RELEVANT STATUTE

### 29 U.S.C. § 158(d)

### § 158. Unfair labor practices

* * *

### (d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and

conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall

participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * * *

## APPENDIX E — EXCERPTS FROM MEMORANDUM OF AGREEMENT BETWEEN FLORIDA POWER & LIGHT COMPANY AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO

MEMORANDUM OF AGREEMENT

AGREEMENT, made and entered into this 28 day of August, 1953, as amended and changed May 20, 1954, as amended and changed September 28, 1955, as amended and changed November 2, 1956, as amended and changed December 30, 1957, as amended and changed February 11, 1959, as amended and changed December 21, 1960, as amended and changed April 10, 1963, as amended and changed March 16, 1965, as amended and changed February 17, 1967, as amended and changed August 18, 1969, as amended and changed January 14, 1970, as amended and changed March 18, 1970, as amended and changed February 3, 1972, as amended and changed November 15, 1972, as amended and changed February 1, 1974, as amended and changed December 6, 1975, as amended and changed March 10, 1978, as amended and changed February 15, 1980, as amended and changed March 26, 1982, as amended and changed May 25, 1984, and as amended and changed June 4, 1986, as amended and changed June 9, 1989, as amended and changed November 16, 1992, amended and changed January 11, 1994, amended and changed on February 1, 1995 between the FLORIDA POWER & LIGHT COMPANY, its successors or assigns, (hereinafter called the "Company") and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO through its System Council U-4 comprising,

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## LOCAL UNIONS

No. 359 – Miami
No. 622 – Lake City
No. 627 – Fort Pierce
No. 641 – Punta Gorda
No. 759 – Fort Lauderdale
No. 820 – Sarasota and Bradenton
No. 1042 – Sanford
No. 1066 – Daytona Beach
No. 1191 – West Palm Beach
No. 1263 – Palatka and St. Augustine
No. 1908 – Cocoa

* * *

[53] **43. ABSENT NOTICE**

An employee who is unable to report for work must notify his Supervisor, or his designee, at least one-half (1/2) hour before his scheduled starting time in order to allow sufficient time to make arrangements for a substitute. Failure to give said notice will result in forfeiture of pay for the day involved, unless employee furnishes a bona fide excuse or reason for not giving said notice.

**44. DISTRIBUTION OF OVERTIME**

(a) Overtime will be distributed equally by classification in each regular working headquarters to the best ability of the Supervisor in charge, using the biweekly posted overtime list as a guide for such distribution.

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Overtime records at each regular headquarters shall be reviewed every four (4) weeks by the Supervisor and the Job Steward to determine whether all overtime assignments during the period were made in accordance with the terms of the Agreement. If the Supervisor and the Steward agree that all overtime assignments in the period were made in accordance with the terms of the Agreement, they shall sign the overtime record as being correct. A matter concerning an overtime assignment may become a grievance only after the review and providing it is reduced to writing and taken up with the Supervisor within four (4) weeks after such review.

If at any time it is determined that an overtime assignment was not made in accordance with the terms of this Agreement, the remedy shall be makeup overtime work which would not ordinarily be performed on overtime, to take place within thirty (30) days of such determination. Failure to provide such work after such determination shall subject the Company to payment.

The Company will have no obligation to provide makeup overtime work to any employee as a result of the call-out, with less than one (1) hour's notice, or holdover of another employee. The Company shall have no obligation to provide makeup overtime work as a result of an assignment to an employee who was not the low overtime available man in his [54] classification, if at the end of the review period the employee claiming the overtime is the high man in the classification or is within ten (10) hours or ten (10) percent (whichever is higher) of the high overtime man in the classification. For the purpose of distribution of overtime,

the Machinist and Mechanic classifications shall be considered as one. At a location where Special Maintenance classifications are employed, the Special Maintenance classification and its corresponding regular classification will be considered as one (1) classification.

All Distribution employees and Special Crews in PGBU and Nuclear Division may be called out if the call out occurs within two (2) hours of their regular starting time. This agreement will not effect the current manner in which employees are REQUIRED to work overtime.

Overtime will be distributed according to functional work type (Construction, Operation or Transmission) within Operation Areas, Construction Regions, and Transmission Areas. Geographical boundaries as defined by the Company will be established for Operations and Transmission Work Headquarters.

The Operations Work Headquarters will be primarily utilized for trouble and maintenance type overtime and Construction Work Headquarters will be used primarily for date-driven construction overtime. Construction employees may be utilized for Operation overtime after eligible Operation employees within thirty (30) miles have been offered.

The Company and Union agree that Operation, Construction and Transmission employees may be located at the same Service Centers. These "split" Service Centers shall be designated as separate Work Headquarters as the term is used in the Memorandum of Agreement. In these

locations, separate overtime lists shall be maintained for Construction, Operations and Transmission.

(b) In compiling the biweekly posted overtime list, the following conditions will be adhered to:

(1) Overtime list will be made up of only employees who wish to be on it. Employees who are not on [55] the list will be considered to have one hour more overtime than the high overtime man in each classification. All overtime hours worked by the employee in his own classification, or while relieving or working in another classification, or while working at another location, will be included in totals shown on the above posted list, except as provided in Memorandum of Agreement 48.1(b) "Itinerant Crews" and Memorandum of Understanding Paragraph 4 "Assignment of Plant Maintenance Personnel". Employees who submit a memo to supervision expressing a desire to relieve on overtime in classifications they are qualified to work, will be considered by seniority for relieving on overtime in these classifications, whether they are on the overtime list or not. Employees may elect off the overtime list at the end of a pay period. An employee who makes such election will be dropped from the overtime list for the next six (6) pay periods.

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(2) When an employee changes his regular headquarters or enters a new classification, and wishes to be on the overtime list, the employee will be placed on the overtime list at the average overtime of the classification. Employees who have elected not to be on the overtime list and wish to be may notify supervision, by memo. These employees will be placed at one hour above the employee with the greatest number of overtime hours on the overtime list in their classification according to the time limits specified in the foregoing Subsection (b)(1).

(3) If an employee refuses overtime which the Company gets someone else to perform, the overtime will be charged against the employee who refused. For call-out overtime, the employee shall be charged if they do not have a telephone. If the employee's phone is answered and such employee fails to work the overtime assignment, they shall be charged the overtime hours. If however, the [56] employee responds within one (1) hour expressing a desire to work, they will not be charged if the assignment has been filled. The Company agrees that in the event all the personnel in a classification at the headquarters are requested to work overtime, those employees in that classification refusing will be charged for

the overtime worked unless they are sick or on excused absence. Overtime will not be charged against apprentices who turn down overtime to attend apprentice training classes.

(4) If an employee is sick, or on vacation, or on excused absence, and is offered overtime but refuses it, he will not be charged for the overtime refused. This is not to be interpreted as meaning that employee is not subject to call-back while on vacation, as provided in subparagraph 8(b) of this Agreement. For distribution of overtime purposes an employee shall be considered on vacation from the time he finishes work on his last scheduled workday before going on vacation until his scheduled starting time on his first scheduled workday after his vacation.

(5) At the end of the payroll period ending nearest January 1 of each year, the overtime list for each classification at each location will be returned to zero.

(6) Junior employees will not be forced to work an overtime assignment for more than two (2) consecutive days. The only exception would be if there were no other employees available in that classification and location or everyone is assigned to work overtime.

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(7) The provisions of this Paragraph should not be interpreted to restrict the Company's right to require employees to work overtime.

(8) If this method results in an obviously inequitable distribution of overtime, then the Director of Labor [57] Relations and the Business Manager will work out a method of correcting such inequity.

(c)(1) For assignments of an emergency nature such as; storm or rush work where employees are temporarily assigned away from their regular headquarters and required to be away overnight for the Company or other utilities, in or out of State. The Company will select the work headquarters, classifications and numbers of employees to be traveled. By the selected classifications within the work headquarters the employees with the most actual hours of call out overtime worked will be offered the assignment first.

(c)(2) These employees shall be paid a minimum of fourteen and one half (14 1/2) hours a day exclusive of meals, each day away from the regular work headquarters, except when the requesting utility has work rule constraints of a less number of hours, with one day of unpaid rest time after thirteen

(13) consecutive days of work. The daily starting time will be the scheduled departing time from the lodging location and the ending time will be the actual arrival time back at the lodging location.

* * *

[76] * * *

**58. CONFLICT WITH LAWS AND GOVERNMENT REGULATIONS**

(a) Any part of this Agreement that may be construed by proper authority or by mutual agreement to be in conflict with any mandatory State or Federal Laws or Executive Orders, then such part shall be suspended and the appropriate mandatory provision of the State or Federal Laws or Executive Order shall prevail.

(b) If the so-called "Right to Work" amendment of the Florida Constitution is held by the United States Supreme Court as being not applicable to the Maintenance of Membership provisions of this Agreement, then this Agreement shall be automatically amended by the elimination of Article III as written above and the putting in its place of Article III of the now terminated April 29, 1946, Agreement between the Company and the Union as originally written.

* * * *